

Haselwood

80411-7

NO. 33910-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II

CHARLES C. HASELWOOD, and JOANNE I. HASELWOOD,
husband and wife,

Respondents,

vs.

RV ASSOCIATES, Inc.,

Petitioner,

and

BREMERTON ICE ARENA, INC., a Washington corporation;
GREGORY S. MEAKIN and DEBORAH A. MEAKIN, husband and
wife; STIRNCO STEEL STRUCTURES, INC., a Washington
corporation; FRONTIER BANK, a Washington bank corporation,
City of Bremerton,

Defendants.

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DIVISION II
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INTRODUCTION

Through this litigation, appellant RV Associates attempts to obtain priority for its mechanics' and materialmen's lien, over respondents Haselwood's (lender's) first-position deed of trust and UCC-1 filings. These instruments secured financing for the entire ice-arena project. RV worked on the project, but neither exception to the lender's normal statutory priority applies.

Failing this, RV tried to use the substitute remedy of removal provided in RCW 60.04.051 to obtain priority for its lien. That statute subjects real property to mechanics' and materialmen's liens, providing a substitute remedy of removal when the title or interest in the real property cannot be subjected to the lien. Under the plain language of RCW Chapter 60.04 and longstanding Washington law, however, the removal remedy cannot apply here because removal applies to and substitutes for only real property liens, and RV cannot lien the public property underlying the arena as a matter of law. The trial court also determined that RV could not amend its complaint to add futile claims 1.5 years after commencing this litigation.

The trial court's summary judgment decisions are unremarkably correct as a matter of law. This Court should affirm.

RESTATEMENT OF ISSUES

1. May RV lien the undisputedly public property under the Arena, where Washington law has long held that public property is not subject to mechanics' or materialmen's liens?
2. If not, are the lender's deed of trust and UCC-1 filings superior to RV's lien, where the lender recorded first, and neither statutory exception to the lender's normal statutory priority applies?
3. Is the removal remedy unavailable to RV, where (a) that remedy applies solely to a lien on real property created by that statute, of which RV has none; (b) removal is a substitute remedy invoked only when the title or interest in the real property cannot be subjected to that real-property lien, so it cannot create lien priority for liens on improvements; and (c) the removal remedy is not an exception to the lender's normal statutory lien priority?
4. Would permitting RV to amend its Answer to add new complaints have (a) prejudiced the lender, where RV sought to amend after 1.5 years of litigation and numerous dispositive summary judgment motions; and (b) been futile, where RV failed to even allege the key factual prerequisite of its new claim?
5. Should the Court award the lender attorneys' fees?

RESTATEMENT OF THE CASE

This restatement clarifies the relevant entities, their legal relationships, and their interests (*vel non*) in the real property and improvements. The procedural history is particularly important because RV's characterizations are inconsistent with the trial court's actual rulings.

A. The City and BIA entered a Concession Agreement, under which the City granted BIA the use of public property, and BIA agreed to construct and operate the Ice Arena and provide the City free ice-time.

The City of Bremerton and Bremerton Ice Arena, Inc. ("BIA") entered a "Concession Agreement" to permit BIA to develop, construct, and operate an ice arena on public property. CP 618; Brief of Petitioner (BP) 2. Under the Concession Agreement, the City contributed the use of the real property, and BIA agreed to secure funding, oversee construction, and operate the Arena. *Id.*; CP 263-64, ¶ 1.1. But the City and BIA expressly did not form a joint venture or other public/private partnership. CP 262.

The Concession Agreement anticipates a third-party lender; BIA and the City acknowledged that "any lender" will require the Agreement as protection and security. CP 262-63. The City and BIA entered the Agreement on August 9, 2002 (CP 288, 289), and

recorded a Memorandum of the Agreement on September 13, 2002. CP 618.

B. The Haselwoods loaned BIA the funds to construct a community ice arena.

Chuck and Joanne Haselwood (lender) agreed to loan BIA funds to construct the Arena. CP 813. Although the lender is a prominent local business owner, the Arena was not primarily a business venture. *Id.* Rather, the “primary motivation” for funding construction of the Arena was to “bring ice to Kitsap County in order to improve the quality of life for residents, especially children.” *Id.*

The lender initially loaned BIA just under \$3.8 million for the project, and BIA gave the lender a promissory note on September 5, 2002. CP 619, 630-34. This note is secured by a commercial security agreement (CP 302-34); it is also secured by a deed of trust, assignment of rents and leases, security agreement and fixture filing, all recorded on September 13, 2002.¹ CP 636-47; BP 4. BIA’s president, Gregory Meakin, also executed a commercial guaranty. CP 699-705.

¹ The deed of trust contains all of these agreements. CP 302 (penultimate paragraph). It was re-recorded on November 12, 2002, to correct a scrivener’s error. CP 8.

The lender subsequently agreed to loan BIA an additional \$770,000, secured by the same deed of trust. CP 97-103. BIA executed a new promissory note for the combined loan amount – just over \$4.5 million – and modified the deed of trust, which it re-recorded on July 15, 2003. CP 105-09.

C. Throughout the Concession, the City owns the real property, which BIA may not subject to any liens, while BIA owns the improvements, subject to the lender's first-position deed of trust and UCC-1 filings.

Under the Concession Agreement, which lasts 10 years, with four successive 10-year renewal options, the City owns the real property underlying and around the Arena. CP 263-64 (§ 1.1); CP 264 (§§ 2.1-2.2); CP 618. The City will not grant any type of security interest in the real property to the lender. CP 275, § 6.2. And the City forbids BIA from otherwise encumbering the real property, including with mechanics' and materialmen's liens:

. . . it is mutually understood and agreed that the [BIA] shall have no authority, express or implied, . . . in any manner to bind, the interest of the CITY in the Premises . . . for any claim in favor of any person dealing with [BIA], including those who may furnish materials or perform labor for any construction or repairs, and each such claim shall affect and each such lien shall attach to, if at all, only the right and interest granted to [BIA] by this Agreement.

CP 274 (§ 5.9, "No Liens").

The City grants BIA solely a “ground and use concession.” CP 263, ¶ 1.1. CP 618. Contrary to RV’s claim that BIA “effectively leased city property” (BP 2), the City expressly refused to convey to BIA “the fee ownership or leasehold interest of the real property.” CP 263, ¶ 1.1. BIA owns the improvements during the Agreement’s term (*id.*), and the City agrees to allow BIA to pledge those assets, and to subordinate the City’s interest in the collateral to the lender’s first-position security interest (CP 275, ¶ 6.2):

The CITY consents to the grant, transfer, pledge and assignment of any and all right, title, claim, interest of [BIA] in and to this Agreement and in the Premises, including improvements and personal property on the Premises (“Collateral”) . . . The CITY shall recognize lender’s first priority security interest in the Collateral and the City hereby subordinates any and all interest of the CITY in said Collateral to lender.

The deed of trust notes that BIA owns all of the “Property, other than the Realty.” CP 307. BIA grants the lender a first-position security interest in all of its interest, including the Concession Agreement; buildings and improvements; personal property (including fixtures and equipment, easements and rights of access); rents and revenues; intangibles related to development and use of the property; all stock or other evidence of ownership; and all proceeds related to these items. CP 302-04.

D. Procedural History.

BIA defaulted on its promissory notes in August 2003 (CP 9) and the lender filed a Foreclosure Complaint. CP 4-16. RV's Answer claims that it has a lien on the real property, prior to the lender's security interests.² CP 124, ¶ 2.6. RV also claims that under the relation-back statute (RCW 60.04.061)³ the priority date for its lien is determined by the date it began work – September 1, 2002⁴ – not the day it filed its claim of lien. CP 125, ¶¶ 2.7, 2.8.

RV moved for summary judgment to establish its priority under the relation-back statute. CP 156-57, 158-69. The lender responded that (1) the real property is not lienable because it is public property (CP 921); (2) RV's lien claim is invalid (CP 923-24); and (3) even assuming that RV had a valid lien on improvements, the lender could not determine priority because the lender recorded on September 13, 2002, but RV's claim of lien stated only that it began work in "September 2002." CP 923, 938.

² Although RV's Answer does not say whether its lien is on real property or improvements, it references Ex C to the Answer, which is a description of the real property upon which the Arena was built. CP 124, ¶¶ 2.5-2.6; CP 145-46.

³ As explained below, this statute applies only to liens "upon a lot or parcel of land." All relevant statutes are appended to this brief.

⁴ RV's brief now claims that it began work on September 6, 2002. BP 3.

In July 2004, the trial court ruled that RV's lien could not attach to the Concession Agreement or to the public property.⁵ CP 609. The court permitted RV to amend its lien to comply with Chapter 60.04. *Id.* It also ruled that RV's lien "may" attach to "certain improvements," but reserved ruling on that issue. CP 609-10, ¶ 6.

The trial court subsequently ruled that "RV['s] lien is junior, inferior and subordinate to [the lender's] Deed of Trust and UCC-1 Financing Statements." CP 773, ¶ 4. RV's assertion that the trial court ruled that its lien did not attach to improvements (BP 11) is incorrect: the only lien to which the trial court could have been referring is an improvements lien because the court had already ruled that RV did not have a lien on real property.⁶ CP 609, ¶ 3.

In August 2004, RV sought summary judgment that it could remove improvements under RCW 60.04.051 (the "removal

⁵ The court ruled on this issue in July, but entered orders in September.

⁶ RV also claims that the trial court erred in ruling that its lien did not attach to the "leasehold interest . . . of the lessee." BP 11. RV does not provide a citation, no such interest or lessee exists, and the court entered no ruling addressing a lien on a nonexistent "leasehold interest." As noted above, the trial court ruled that RV's lien did not attach to the Concession Agreement (CP 609, ¶ 5), which unequivocally states that it did not grant anyone a leasehold interest in the real property. CP 263, ¶ 1.1. RV does not challenge this ruling.

statute”). CP 348-56. As discussed in detail *infra*, the removal statute creates a lien on real property, and a substitute remedy of removal and sale of improvements if the underlying real property cannot be “subjected to” this lien. RCW 60.04.051. Under long-standing common law, however, removal is not permitted if it will damage the real property (BP 17); the trial court denied RV’s motion due to fact questions on whether removal would damage the property. CP 1051-53.

In January 2005, the lender filed two summary judgment motions. CP 617-26, 1054-66. In one motion, the lender argued that removal is not available to any defendant because the deed of trust is prior to all liens. CP 1062-66. The removal statute is not an exception to the fundamental rule of first in time, first in right, so after-filed liens do not justify removal. CP 1064-65.

In the other motion, the lender asserted its priority over RV’s lien. CP 617-26. Simply put, the relation-back statute applies only to liens on “any lot or parcel of land,” and RV cannot lien public property. CP 625; RCW 60.04.061.

In May 2005, the trial court ruled that removal is available only to a lien claimant with a senior lien on the improvement the claimant seeks to remove:

The limited remedy of removal under RCW 60.04.051 is only available to a lien claimant that otherwise has priority under RCW 60.04 with respect to the improvement sought to be removed.

CP 764, ¶ 2. The court ruled that because all defendants' liens are junior to the lender's deed of trust and UCC-1 filings, no defendant could remove. CP 764-65, ¶¶ 3-4. The order, however, reserved ruling on RV's lien. CP 764-65, ¶¶ 2-4.

In July 2005, the trial court ruled that since RV did not have a lien on the real property (CP 609, ¶ 3), the plain language of the relation-back statute did not apply because RV's lien was not on "any lot or parcel of land." CP 773, ¶ 3. Thus, RV's lien was junior to the lender's deed of trust and UCC-1 filings (CP 773-74, ¶ 4) because RV recorded its lien after the lender recorded its deed of trust. CP 773, ¶ 2.

In March 2006, RV moved to amend its answer to add additional claims against the lender and the City – seven months after the trial court denied RV's motion to remove (CP 774), over two years after RV filed its original answer (CP 130), and nearly three years after RV completed the improvements. BP 3. The trial court denied RV's motion to amend, finding "that good cause does not exist." CP 820.

SUMMARY OF ARGUMENT

Under a long line of Washington cases holding that public property is not subject to mechanics' and materialmen's liens, the trial court correctly ruled that RV does not have a lien on the publicly-owned property under and around the Arena. This correct ruling determines the outcome here, under RCW Chapter 60.04:

- ◆ RCW 60.04.226 establishes the priority of financial encumbrances, giving priority to deeds of trust over subsequently filed liens, absent one of two express exceptions. Thus, the lender's deed of trust is senior to RV's lien if no exception applies.
- ◆ One exception to § .226 is RCW 60.04.061 – the relation-back statute. Section .061 sets the priority date of a mechanic's lien as when the work began, not when the lien was filed. But § .061 applies only to liens on a "lot or parcel of land." Since RV has no lien on any lot or parcel of land, its mechanics' lien cannot relate back.
- ◆ The second exception to § .226 is RCW 60.04.221. Section .221 subordinates a senior deed of trust if the lien claimant gives the lender proper notice and the lender fails to see the claimant paid. RV did not (and does not) invoke this remedy.
- ◆ Since neither exception to § .226 applies, the lender's deed of trust is senior to RV's lien because the lender recorded before RV did. RCW 60.04.226.
- ◆ RCW 60.04.051 subjects real property to a mechanics' lien and permits a court to order removal of improvements to satisfy the lien when the title or interest in the property cannot be subjected to the lien. But since RV cannot have a lien on public property, § .051 cannot apply. And a substitute remedy like removal has the priority of the lien for which it substitutes, so any removal "right" is junior to the lender's deed of trust and UCC-1 filings in any event.

RV offers the Court no good reason to depart from controlling Washington precedents and the plain language of the relevant statutes. Its authorities are inapposite and contrary to Washington law. The Court should reject RV's claims.

Finally, the trial court was well within its broad discretion in denying RV's motion to amend. After 1.5 years of litigation and numerous dispositive summary judgment motions, RV's motion to amend was simply too little too late. In any event, RV does not adequately address the issue, and the Court need not address it.

The Court should affirm, and award the lender attorney fees.

ARGUMENT

A. Under longstanding Washington law, RV cannot lien public property.

RV agrees that the real property under and around the Arena is public property. BP 2. Over 75 years ago, our Supreme Court noted that Washington has never subjected public property to mechanics' or materialmen's liens:

It seems plain that [Rem. Comp. Stat.] sections 1159 and 1161 were enacted and have remained the law in recognition of the law that public property has never been subject to mechanics' or materialmen's liens under our general mechanics' and materialmen's lien statutes.

Hall & Olswang v. Aetna Cas. & Sur. Co., 161 Wash. 38, 47, 296 P. 162 (1931). The trial court's ruling that RV's lien does not attach

to the real property is consistent with a long line of controlling Washington precedents.

In **Hall & Olswang**, Hall sought recovery against Aetna, the surety on a construction bond, for work performed on the construction of a building for the school district. **Hall**, 161 Wash. at 39-40. Hall sought recovery against Aetna under the contractor's bond and against the school district for the school district's share of the contract price. *Id.* Aetna joined all of the actions for unpaid labor and materials, claiming the school district's share of the contract price was subject to all outstanding claims. *Id.* at 40. The district did not dispute Aetna's claim, and the trial court divided the district's portion of the contract price among the claimants. *Id.*

On review, the Court noted that the building contract "seems to suggest possible lien rights against the building for labor and material." 161 Wash. at 47. Nonetheless, the Court noted that public property in Washington "has never been subject to mechanics' or materialmen's liens":

. . . public property has never been subject to mechanics' or materialmen's liens under our general mechanics' and materialmen's lien statutes. . . . The almost universally accepted rule is that general mechanics' and materialmen's lien statutes, in the absence of express words therein, subjecting public property to such liens, do not subject public property to such liens. . . .

Hall, 161 Wash. at 47. Since *Hall*, our courts have reaffirmed that public property is not subject to such liens. *3A Industries, Inc. v. Turner Const. Co.*, 71 Wn. App. 407, 869 P.2d 65 (1993), *rev. denied*, 124 Wn.2d 1006 (1994); *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 729, 741 P.2d 58, *rev. denied*, 109 Wn.2d 1009 (1987).

While the Court has permitted a mechanics' lien on a sidewalk, that sidewalk was not public property. *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 685 P.2d 1062 (1984). There, King County argued that no "property subject to lien" existed for purposes of the removal statute because the sidewalks were public property. 101 Wn.2d at 827. When the lien was filed, however, the County had not yet approved the incomplete sidewalks or released the guarantee bond. *Id.* at 828. The Court held that "[s]ince the sidewalks are not [yet] public property, they may be subject to a lien." *Id.* at 828-29.

But here, RV agrees that the real property is public property. BP 2. Washington courts have never subjected public property to mechanics' liens. *Hall*, 161 Wash. at 47. The trial court correctly ruled that RV has no lien on the public's property. *Id.*

- B. RV's lien on improvements is junior to the lender's deed of trust and UCC-1 filings because the relation-back statute applies solely to liens on real property, and RV failed to invoke the only other statutory exception to the rule that deeds of trust are superior to subsequently filed liens.**

RV agrees that the lender recorded its deed of trust before RV filed its lien. BP 3-4. The deed of trust therefore has priority under RCW 60.04.226, unless an express statutory exception applies. RV raises only one of the two exceptions in § .226 – the relation-back statute, RCW 60.04.061. But this statute applies only to a “claim of lien . . . upon any lot or parcel of land.” *Id.* RV has no such lien. *See supra*, Arg. § A. RV did not follow the statutory requirements for the second § .226 exception, and does not raise it here. Thus, neither exception to § .226 applies, and the lender's deed of trust is senior to RV's lien. The Court should affirm.

The trial court's ruling on relation back required straightforward statutory interpretation. *Compare* CP 773 with RCW 60.04.061. The Court's review is *de novo*. ***State v. Donery***, 131 Wn. App. 667, 670, 128 P.3d 1262 (2006). When construing a statute, the Court looks at its “plain language in order to give effect to legislative intent.” *Id.* If the statute is unambiguous, the Court derives the legislative intent “from the [statute's] plain language

alone.” *Id.* The Court presumes that the statute means exactly what it says. *In re King*, 146 Wn.2d 658, 663, 49 P.3d 854 (2002).

RCW 60.04.226 governs the priority of financial encumbrances on real property. The statute codifies the general rule that a mortgage or deed of trust is prior to all subsequently filed liens – “first in time, first in right”:

Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust . . .

RCW 60.04.226. The proviso excepts §§ .061 & .221. Section .061 – the relation-back statute – subordinates a deed of trust to a mechanic’s lien by relating the lien back to the date work began, as opposed to the date the lien recorded against the real property:

The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

RCW 60.04.061.

Following this plain language, the trial court ruled that the relation-back statute does not apply because RV has no lien on “any lot or parcel of land”:

Defendant RV does not have a claim of lien on any lot or parcel of land in the case at bar and is not entitled to use the date it commences work or performed labor on the project commonly known as the Bremerton Ice Arena as the date of priority for its lien.

CP 773, ¶ 3. Since RV's lien does not relate back to the date it commenced work, the court held that its lien is subordinate to the lender's deed of trust and UCC-1 filings, recorded well before RV's lien. RCW 60.04.226; CP 773.

The trial court was correct. RCW Chapter 60.04 creates two types of liens. First, § .021 creates a lien on improvements:

[A]ny person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement

RCW 60.04.221. Second, § .051 creates a lien on the improved real property:

The lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance, directly or through a common law or construction agent the labor, professional services, equipment, or materials were furnished, as the court deems appropriate for satisfaction of the lien.

RCW 60.04.051.

But the relation-back statute, RCW 60.04.061, applies solely to the liens on a "lot or parcel of land" – § .051 liens. Sections .051 and .061 use virtually identical language: "lot, tract, or parcel of land" (§ .051), and "lot or parcel of land" (§ .061). But nothing in the

relation-back statute refers to the liens on improvements created in § .021. The Legislature thus limited the relation-back statute to liens on real property.

RV has no lien on real property. It may have a lien on the improvements, but the relation-back statute does not apply to liens on improvements. The first exception to RCW 60.04.226 thus does not apply. RV's lien cannot relate back.

As noted above, RV relied solely on this inapplicable relation-back exception to § .226's first-in-time rule. The second exception, § .221, allows mechanics to collect amounts past due directly from lenders, subordinating senior trust deeds to junior liens if the lender fails to comply with the statutory requirements:

(1) Any potential lien claimant who has not received a payment within five days after the date required by their contract . . . may within thirty-five days of the date required for payment give a notice as provided in subsections (2) and (3) of this section of the sums due and to become due, for which a potential lien claimant may claim a lien under this chapter.

. . .

(3) The notice shall be given in writing to the lender

. . .

(5) After the receipt of the notice, the lender shall withhold from the next and subsequent draws the amount claimed to be due as stated in the notice.

...
(7) In the event a lender fails to abide by the provisions of
*subsections (4) and (5) of this section, then the mortgage,
deed of trust, or other encumbrance securing the lender
shall be subordinated to the lien of the potential lien claimant
...

RCW 60.04.221.

RV failed to invoke the § .221 exception. RV did not give the lender the required notice, did not raise this exception before the trial court, and does not raise it on appeal. The exception – which may have been RV's sole remedy – cannot apply now.

In short, the lender recorded its deed of trust in September 2002, well before RV recorded its lien in July 2003. BP 3-4. Since the two statutory exceptions to the first-in-time statute do not apply, this Court should affirm the trial court's ruling that RV's lien is junior to the lender's deed of trust. CP 773.

C. The substitute remedy of removal does not apply here because (a) RV cannot lien the public's real property, (b) removal does not apply to liens on improvements, and (c) a substitute remedy cannot assume a higher priority than the lien for which it substitutes.

RV primarily relied on the removal provision in RCW 60.04.051. As with § .061, however, § .051 does not apply because it creates a lien on real property, and RV cannot have a lien on the public's property. Thus, the trial court correctly ruled

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that its lien is junior to the lender's deed of trust and UCC-1 filings. Removal does not apply to liens on improvements, and it cannot assume a higher priority than the § .051 lien on real property for which it substitutes. Again, this Court should affirm.

As noted above, § .051 creates a mechanic's lien on improved real property. RCW 60.04.051 ("The lot, tract, or parcel of land which is improved is subject to a lien"). This lien is limited to "the extent of the interest of the owner at whose instance, directly or through a common law or construction agent the labor . . . or materials were furnished" *Id.* And if the title or interest in the land cannot be subjected to this lien, then a court may permit removal and sale of the improvements to satisfy the lien:

If, for any reason, the title or interest in the land upon which the improvement is situated cannot be subjected to the lien, the court in order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien.

RCW 60.04.051.

Thus, removal is simply a substitute remedy for a § .051 lien on real property that the claimant cannot satisfy (e.g., due to superior deeds of trust, security interests, etc.). But for the reasons discussed above, RV cannot lien the public's real property, so this substitute remedy cannot apply at all. Put slightly differently, while

“the court in order to satisfy the lien may order the sale and removal of the improvement from **the land which is subject to the lien**,” (§ .051, emphasis added), here the land is not subject to the lien, so removal cannot apply.

Similarly, the § .051 lien is limited to “the extent of the interest of the owner at whose instance, directly or through a common law or construction agent the labor . . . or materials were furnished” RCW 60.04.051. This provision typically limits the lien when there are multiple owners of the real property, but only one is responsible for the improvements. But here, BIA ordered RV’s work and, under the Concession Agreement, BIA has no ownership interest in the real property and is expressly forbidden from binding the City’s real property. CP 274 (§ 5.9, “**No Liens**”). Again, RV has no lien under the statute’s plain language.

The Court must presume that the Legislature was well aware of the longstanding Washington law that public property is not subject to mechanics’ and materialmen’s liens when it adopted this statute. See, e.g., *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). The Court will not presume that the Legislature intended to overrule or otherwise change this longstanding common law absent a clearly manifested intent to do

so. See, e.g., **Green Mountain Sch. Dist. No. 103 v. Durkee**, 56 Wn.2d 154, 161, 351 P.2d 525 (1960). No such intent appears here. Thus, § .051 cannot create a lien on publicly-owned property.

In any event, a substitute remedy of removal could never assume a higher priority than the lien for which it substitutes. Simply put, § .051 does not address lien priorities, much less subordinate a prior deed of trust to a junior lien. Rather, the Legislature expressly addressed priorities in RCW 60.04.061, .181, and .226. Applying § .051 in the manner RV advocates would engraft a new material term onto this provision – priorities – which the Court will not do. See, e.g., **Kilian v. Atkinson**, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

Furthermore, permitting RV to remove absent lien priority also would make § .051 a third exception to § .226, which it is not. See RCW 60.04.226. The Court must harmonize statutes within the same act, if possible. See, e.g., **State v. S.P.**, 110 Wn.2d 886, 890, 756 P.2d 1315 (1988). As noted above, § .226 sets forth the general rule of lien priority, and its only two exceptions. Under § .226, the lender's deed of trust is prior to RV's lien because neither exception applies. Allowing RV to nonetheless remove and sell improvements to "satisfy" its junior lien would override the § .226

priority granted to the lender's deed of trust by adding a third exception to § .226. The Court should not do this. *Kilian*, 147 Wn.2d at 21; *S.P.*, 110 Wn.2d at 890.

The bottom line here is that RV had a potential remedy under the statutory scheme, but failed to invoke it. RCW 60.04.221. The Court should not contort the statute to save RV from its own conduct. The Court should instead affirm.

D. RV provides no good reason to depart from controlling Washington case law or reject the plain language of the applicable statutes (Response to RV's Arguments).

RV's arguments do not change the outcome. It mostly ignores controlling precedent in favor of an inapposite foreign case and a treatise that actually supports the lender's arguments. The Washington cases it cites are inapposite, or again support the lender. The remainder of its arguments are just unsupported.

1. The Court should not reject a long line of controlling Washington cases in favor of one foreign case and a treatise that actually supports the lender's claim (BP 8-14).

As discussed above, over 75 years of controlling case law recognizes that public property has "never" been subject to mechanics' liens. *Hall*, 161 Wash. at 47. RV does not address *Hall*, or any other controlling authority on this point. BP 8-14. The Court should follow *Hall* and its progeny, and affirm.

RV's first argument purports to address whether a lien can attach to improvements constructed on public property. BP 8. To the extent that RV is simply asserting that its lien may attach to improvements on public property, as opposed to the real property itself, the lender does not disagree – improvements are lienable. RCW 60.04.021. But whether RV has a lien on any improvements is moot because the remedies RV seeks – relation-back and removal – both require a lien on real property.⁷ *Infra*, § IV. B & C.

RV's primary (incorrect) argument is that its lien may attach to public property if the City holds the property in a proprietary capacity. BP 11-14. In support, RV makes two additional incorrect claims: (1) the "prevalent rule in all jurisdictions in the United States [is] that governmental property held in a proprietary capacity is subject to a mechanics [*sic*] lien"; and (2) Washington follows the "prevalent rule." BP 11 (without citation). RV quotes Eugene McQuillin, The Law of Municipal Corporations, Vol. 10, § 28.58 (3d ed. 1999) ("McQuillin"), but McQuillin does not support its claim. *Compare* BP 11 *with* McQuillin at 231.

⁷ RV also claims that the court erroneously ruled that its lien "did not attach to the leasehold interest and improvements of the lessee." BP 10-11. As noted above, the court made no such ruling because there is no such interest. *Supra*, p. 8 n.6.

The “rule” RV quotes is actually an exception to the general rule that public property is not lienable. McQuillin at 231, 233 n.14. Immediately preceding the language RV quotes, McQuillin states the general rule:

Property of municipalities, school districts, and other quasi-municipal corporations frequently is generally exempt from mechanics’ liens to which private property is subject, unless the statute specifically provides for it.

McQuillin at 231 (footnotes omitted). McQuillin’s statement of the general rule is consistent with Washington’s: public property is not lienable. *Compare id. with Hall*, 161 Wash. at 47.

RV made the same incorrect argument before the trial court, misreading precisely the same language. *Compare* BP 11-12 with CP 253. The lender made this same correct response. CP 344-45. RV adds nothing new here.

RV also relies on *American Seating Co. v. City of Philadelphia*, 434 Pa. 370, 256 A.2d 599 (1969), the Pennsylvania case McQuillin cites for the exception to the rule that real property is exempt from mechanics’ liens. BP 12-13; McQuillin at 231 n.14. RV claims that this case and *American Seating* are “virtually identical.” BP 12. The trial court correctly rejected this argument. *Compare* BP 12-13 with CP 253-54. *American Seating* concerned

a statute that prohibited liens “for labor or materials furnished for a purely public purpose.” 434 Pa. at 373. The court held that the statute did not “preclude” a mechanic’s lien on public property, despite the “general proposition of Pennsylvania law” that “liens against municipal properties are void.” *Id.* at 374-75. The court then created an exception to the general rule, holding that public property may be lienable when:

the municipality acts as an absent landlord, entrusting the management and control of its premises to its tenant; and where the building was constructed and paid for by the tenant; and further, **where the municipality in owning the building**, discharges a function not governmental in nature, but rather proprietary and quasi-private . . .

Id. at 375 (emphasis added).

Washington does not recognize an exception to the general rule that public property is not lienable. Rather, in Washington “public property has never been subject to mechanics’ . . . liens.” *Hall*, 161 Wash. at 47. And the City of Bremerton does not own the ice arena, or otherwise act in a proprietary capacity in any event. *American Seating* cannot apply here.

The only Washington cases RV cites to support this claim are inapposite. BP 13 (citing *Kesinger v. Logan*, 51 Wn. App. 914, 756 P.2d 752 (1988), *aff’d on other grounds*, 113 Wn.2d 320

(1989); **Sisson v. Koelle**, 10 Wn. App. 746, 520 P.2d 1380 (1974)). According to RV, the **Kesinger** court held that when county land is “never devoted to any use” it is held in a proprietary capacity; and the **Sisson** court held that a public right-of-way that has “never been improved” is held in a proprietary capacity.” *Id.* That is all RV wrote. BP 13.

Both cases are easily distinguished on the ground that they address whether public property held in a proprietary capacity can be adversely possessed – not whether it is lienable. **Kesinger**, 51 Wn. App. at 918-19; **Sisson**, 10 Wn. App. at 748-49. It should go without saying that adverse possession – governed by RCW Chapter 7.28 – and mechanics’ liens – governed by RCW Chapter 60.04 – are entirely different statutory schemes and entirely different claims, to which very different precedents, policies, principles, and even remedies apply. RV makes no effort to explain why adverse possession law applies here. BP 13. The Court should disregard this argument.⁸

⁸ See, e.g., **Johnson Forestry Contracting, Inc. v. Washington State DNR.**, 131 Wn. App. 13, 25, 126 P.3d 45 (2006) (“court will not consider arguments for which a party has not cited legal authority”); **Bercier v. Kiga**, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) (“We need not consider arguments that are not developed in the briefs and for which a party has not cited authority”), *rev. denied*, 155 Wn.2d 1015 (2005).

Further, both cases involve property that the public entity at issue “never devoted to any use.” **Sisson**, 10 Wn. App. at 751; see also **Kesinger**, 51 Wn. App. at 919. But here, the City gave BIA a “ground and use concession” in the real property. CP 263, ¶1.1. In exchange, BIA is required to “provide[] indoor ice sports, fitness, recreation, and community activities” CP 267, ¶ 4.1. The Agreement reiterates “[t]he availability of recreational opportunities for CITY residents is a material consideration for this Agreement.” CP 268, ¶ 4.2. Thus, the “use” for which the City “devoted” its property was to provide an ice arena for the public. **Sisson**, 10 Wn. App. at 751. This case is nothing like **Kesinger** or **Sisson**.

In any event, the Supreme Court held that the **Kesinger** court erred by making an inaccurate assumption to reach the adverse possession issue, at least mooted the **Kesinger** decision. 113 Wn.2d at 329-30. **Kesinger** is not good law.

2. **The Court should disregard RV’s argument that the relation-back statute applies because it mischaracterizes the statute and the trial court’s ruling, and is inadequate in any event (BP 15-16).**

RV’s primary argument on the relation-back statute ignores that (1) there are two types of mechanics’ liens created under RCW Chapter 60.04 – liens on improvements (§ .021) and liens on real

property (§ .051); and (2) the relation-back statute expressly applies only to liens on real property. RCW 60.04.061; *see supra* Arg. § B. RV claims that § .021, which authorizes liens on improvements, is “[t]he statutory scheme for mechanics [*sic*] and materialmens [*sic*] liens.” BP 8. RV then describes the process for establishing and recording a lien, claiming that when a mechanic’s lien is “properly recorded,” its priority date is when the work began, not the date of recording. BP 9 (citing RCW 60.04.061); *see also* BP 15. But the relation-back statute applies only to § .051 liens on real property, not to every mechanic’s lien. *Supra*, Arg. § B.

RV misconstrues the relation-back statute a second time, claiming that the “date of recording the mechanics’ . . . liens is not dispositive of the effective date of the lien.” BP 15. This statement is accurate only if the relation-back statute (§ .061) applies. Since the relation-back statute does not apply, however, the priority date of a mechanic’s lien is “[t]he date of recording.” BP 15; RCW 60.04.061 & .226.

RV’s argument also mischaracterizes the trial court’s ruling. BP 16. Contrary to RV’s claim, the trial court ruled only that the relation-back statute does not apply because “RV does not have a claim of lien upon any lot or parcel of land.” *Compare* BP 16 *with*

CP 773, ¶ 3. The trial court said nothing about relation-back with respect to leasehold interests or improvements. *Compare* BP 16 with CP 773, ¶ 3.

Finally, the Court should disregard RV's argument on this point because it is made only in passing and without any legal support. ***Johnson Forestry Contracting***, 131 Wn. App. at 25; ***Bercier***, 127 Wn. App. at 824.

3. RV provides no sound reasoning or apposite authority to support its claim that § .051 subordinates prior liens, and the Court should disregard this argument (BP 16-19).

RV does not explain how or why § .051 subordinates prior liens. BP 16. Instead, it summarily concludes that the trial court's ruling is "clearly erroneous" because "[t]he removal remedy found in RCW 60.04.061 [*sic*] has nothing to do with priority." *Id.* RV proves too much: True, § .051 does not address priorities; but as a result, § .051 cannot circumvent the lender's deed of trust's § .226 priority, as discussed above. RV's claim thus fails.

Although RV argues contrary to the plain language of §§ .051 and .226, it does not address either statute's language. BP 16-17. Instead, it briefly discusses a long list of inapposite cases. BP 17-19. RV cites ***Hewson*** for the general position that "where

improvements are made on public property, the removal statute is available to protect the claimant who improved the property.” BP 17. As noted above, however, **Hewson** did not involve removal from public property. It also lacked the multiple lien claimants present here, so priorities were not at issue in **Hewson**.

RV next cites the following cases for the proposition that removal is appropriate if it will not cause damage (BP 17): **Pioneer Sand & Gravel Co. v. Hedlund**, 178 Wash. 273, 277, 34 P.2d 878 (1934); and **Irwin Concrete, Inc., Sun Coast Properties, Inc.**, 33 Wn. App. 190, 653 P.2d 1331 (1982). This issue is not before the Court. Before ruling that RV cannot remove because its lien is junior, the trial court ruled that there are questions of fact as to whether removal would cause damage, denying RV’s motion for summary judgment. CP 1051-52. RV does not challenge that ruling, so it remains the law of the case. BP 1-2. But since the relation-back statute and removal remedy cannot apply, RV cannot obtain priority over the lender, and any fact questions are moot.

RV next cites a long list of cases upholding “[t]he right of removal” under Rem. Rev. Stat. 1146. BP 18-19. None of these cases supports RV’s claim that the removal statute subordinates prior liens:

- ♦ ***Bell v. Groves***, 20 Wash. 602, 604, 56 P. 401 (1899) (sale and removal of building to satisfy liens, where lien claimants had “first and prior liens” on the improvements);
- ♦ ***Bell v. Swalwell Land, Loan & Trust Co.***, 20 Wash. 602, 56 P. 401 (1899) (RV lists this separately from ***Bell v. Groves***, but they are the same case. Groves and Swalwell are both parties in the same case);
- ♦ ***Gile Inv. Co. v. Fisher***, 104 Wash. 613, 618, 177 P. 710 (1919) (affirming the trial court’s denial of removal, where the work was not provided “at the instance of a party owning less than the fee”);
- ♦ ***Brown v. Hunt & Mottet Co.***, 111 Wash. 564, 570, 191 P. 860 (1920) (addressing the priority of lien claimants asserting an interest in funds obtained from the sale of the removed improvement, not priority with respect to the right to remove);
- ♦ ***Blossom Provine Lumber Co. v. Schumacher***, 147 Wash. 369, 373, 266 P. 167 (1928) (no competing interest in improvement sought to be removed); and
- ♦ ***Columbia Lumber Co. v. Bothell Dairy Farm Co.***, 174 Wash. 662, 665, 25 P.2d 1037 (1933) (only one lien claimant, so no priority issue).

Finally, RV cites ***Cornelius v. Washington Steam Laundry***, 52 Wash. 272, 100 P. 727 (1909) for the proposition that “removal applies regardless of priority.” BP 19. ***Cornelius*** is inapposite – it has nothing to do with removal, much less removal where there are competing liens. RV does not discuss ***Cornelius*** (BP 19) and the Court should disregard it. ***Johnson***, 131 Wn. App. at 25.

In sum, RV has not provided any reason to disregard controlling Washington precedent and the plain language of the statutes. The Court should affirm.

E. The trial court was well within its broad discretion in denying RV's motion to amend.

RV moved to amend its answer to add counterclaims against the lender that "in the course of performing its work," RV relied on a letter from the lender that it claims is a "guarantee of payment."⁹ BP 19. The counterclaims lack a factual basis – RV provides no evidence of reliance. In fact, RV's entire argument lacks citation to the record and authority, and the Court need not even consider it. As additional reasons to affirm, permitting RV to amend would have been futile and prejudicial to the lender.

The Court reviews this issue for an abuse of discretion. ***Carrillo v. City of Ocean Shores***, 122 Wn. App. 592, 617, 94 P.3d 961 (2004). Amendment is improper if it would prejudice the opposing party, such as causing "undue delay." ***Wilson v. Horsley***, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Amendment

⁹ The majority of RV's argument on this point addresses its proposed cross-claims against the City. BP 19-21. The lender agrees with and adopts the City's responses on these points.

is also inappropriate when it would be futile. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997).

Moreover, a trial court properly denies a motion to amend an answer to add a counterclaim when “the counterclaim lacks a factual basis.” *Bank of Am. NT & SA v. Hubert*, 153 Wn.2d 102, 123, 101 P.3d 409 (2004). There, BOA moved to amend the same day that the trial court heard summary judgment motions from both parties. 153 Wn. 2d at 123. The trial court denied the motion “based on the ‘late point’ at which the amendment was offered.” *Id.* at 122. The Court affirmed on the ground that the motion was untimely, and on the additional ground that “the counterclaim lacks a factual basis.” *Id.* at 123.

1. **RV fails to adequately address this argument, to support its claims with citation to authority and the record, and to make an adequate record – the Court should disregard.**

Nothing in the record supports RV’s counterclaims and the Court should affirm. To support its claim that “the lender had provided a guarantee of payment to RV Associates, which it relied upon in the course of performing its work,” RV must show that: (1) it received the letter before it completed the improvements; (2) the letter was a guarantee of payment; (3) RV relied on it; and (4)

reliance was reasonable. RV provides no evidence that it received and relied on the letter before it completed the improvements (BP 19-22), and it failed to do so before the trial court as well. CP 797-802. While RV's manager, Steve Davis, submitted no less than four declarations, he never stated when RV received the letter, much less that RV relied on it while performing work on the project. CP 798-800. Further, RV does not discuss the letter. BP 19-22. Nothing in the record supports RV's reliance counterclaims – they “lack[] a factual basis” and the Court should affirm. ***Bank of Am.***, 153 Wn.2d at 123.

The Court should also disregard RV's discussion of the trial court's ruling because it is unsupported. BP 20-21. RV does not cite the record to support its representations about the trial court's ruling, and there is nothing in the record that supports them. *Compare* BP 20 *with* CP 820. Rather, the trial court's written order states simply “good cause does not exist to allow [RV] to amend its Answer and Counterclaim.” CP 820.

Further, although RV claims that it made an offer of proof, it cites nothing. BP 20. If such an offer was made, it is now too late to supplement the record because the lender would have no opportunity to respond. The Court should disregard.

2. Permitting amendment would have severely prejudiced the lender and been futile in any event.

Should the Court nonetheless reach this issue, the trial court properly denied the motion to amend. Permitting amendment after 1.5 years of litigation and numerous dispositive summary judgment motions would have prejudiced the lender greatly. Denial is also proper where allowing RV to amend would have been futile.

Contrary to RV's claim that "no prejudice is alleged" (BP 21) the lender argued that it would be prejudiced by permitting RV to amend. CP 794, 797, 802. RV also incorrectly states that discovery had not begun (BP 21) – three depositions had been taken. CP 802. Witnesses have died and moved. CP 797.

Most prejudicial is RV's undue delay. Assuming *arguendo* that the letter was a guarantee of payment upon which RV could have reasonably relied, RV has a reliance claim only if it received the letter before it finished the improvements in May 2003. BP 3. If it did, RV had the letter for nearly one year before it filed its Answer (CP 155) and nearly three years before it moved to amend.¹⁰ Further, RV concedes that the counterclaims it sought to add are

¹⁰ The motion to amend in the Clerk's Papers is not dated, but the docket indicates that it was filed August 12, 2005.

similar to defendant Stirnco's counterclaims (CP 785) which Stirnco filed over three months before RV's original Answer and well over two years before RV sought to amend. CP 155.

The counterclaims RV sought to add are not new. Rather, RV pursued different legal theories and lost. When it lost, it waited seven months to move to amend. *Compare* CP 774 (denying RV's motion to remove) *with* CP 784-86. Between the time RV would had to have received the letter to make a reliance claim and its motion to amend, three years, one-and-a-half years of litigation, and four dispositive summary judgment motions have passed. RV offers no excuse for this delay, and none is apparent.

Moreover, allowing RV to amend would have been futile. Contrary to RV's claim, it is impossible that RV relied on the letter to begin work because the letter is dated October 14, 2002, and RV claims that it began work six weeks earlier on September 1, 2002. CP 1233 (¶ 1.6). As discussed above, throughout the entire litigation, RV never submitted a sworn statement claiming that it received and relied upon the letter. CP 798-99. RV claims that the trial court did not have the benefit of declarations (BP 21), but Davis filed four declarations supporting RV's claims, not one of which mentions the letter. CP 798-99.

In fact, Davis' declarations contradict RV's reliance claim. Well after RV completed the improvements, Davis filed a declaration stating that when RV began work, he had no knowledge of the financial relationships between the City, BIA, and the lender. CP 199, 251. Although these declarations attempt to support RV's efforts to establish lien priority, Davis does not mention the letter, much less claim he received and relied on it. CP 199, 251.

In sum, the Court should affirm the denial of RV's motion to amend, where RV's arguments are inadequate to warrant review, and amendment would have been both prejudicial and futile.

F. The Court should award the lender attorney fees.

Where, as here, "different construction liens are claimed against the same property," the Court may award the prevailing party attorney fees:

In every case in which different construction liens are claimed against the same property

. . .

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, . . . attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court,

RCW 60.04.181(3). The fees have the same priority as "the class of lien to which they are related." *Id.*

If the Court affirms, then it should award the lender attorney fees. RV's appeal fails to address controlling Washington precedents and statutes under which the Court can and should affirm. RV's primary arguments depend on foreign authority and inapposite Washington cases that do not support its arguments. Many of its arguments are not adequately set forth. RAP 10.3(a). The Court should award the lender attorney fees.

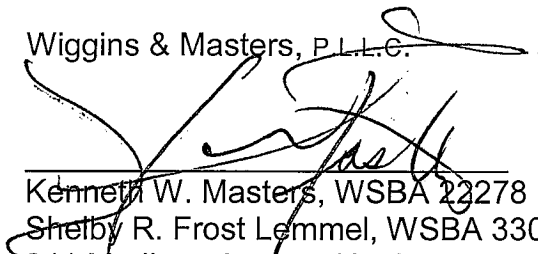
The Court should deny RV fees even if it prevails because it did not request fees in its opening brief. RAP 18.1(a) & (b). Under RAP 18.1, a party requesting attorney fees must "devote a section of its opening brief to the request for the fees or expenses." The appellate courts have repeatedly denied fees even when they are requested, holding that the request is inadequate. See, e.g., ***Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.***, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); ***Pruitt v. Douglas County***, 116 Wn. App. 547, 560-61, 66 P.3d 1111 (2003); ***Phillips Bldg. Co. v. An***, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). RV did not ask for attorney fees, and the Court should not award any even if RV prevails.

CONCLUSION

For the reasons stated above, the lender asks the Court to affirm on all issues, and award the lender attorneys' fees on appeal.

DATED this 30th day of June 2006.

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CERTIFICATE OF SERVICE BY MAIL

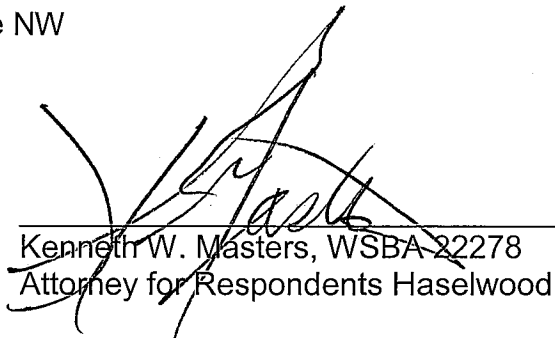
I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENTS** postage prepaid, via U.S. mail on the 30th day of June 2006, to the following counsel of record at the following addresses:

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STATE OF WASHINGTON
BY KS
DEPUTY



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RCW 60.04.021. Lien authorized

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.051. Property subject to lien

The lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance, directly or through a common law or construction agent the labor, professional services, equipment, or materials were furnished, as the court deems appropriate for satisfaction of the lien. If, for any reason, the title or interest in the land upon which the improvement is situated cannot be subjected to the lien, the court in order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien.

RCW 60.04.061. Priority of lien

The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

RCW 60.04.181. Rank of lien--Application of proceeds--Attorneys' fees

(1) In every case in which different construction liens are claimed against the same property, the court shall declare the rank of such lien or class of liens, which liens shall be in the following order:

- (a) Liens for the performance of labor;
- (b) Liens for contributions owed to employee benefit plans;
- (c) Liens for furnishing material, supplies, or equipment;
- (d) Liens for subcontractors, including but not limited to their labor and materials; and
- (e) Liens for prime contractors, or for professional services.

(2) The proceeds of the sale of property must be applied to each lien or class of liens in order of its rank and, in an action brought to foreclose a lien, pro rata among each claimant in each separate priority class. A personal judgment may be rendered against any party personally liable for any debt for which the lien is claimed. If the lien is established, the judgment shall provide for the enforcement thereof upon the property liable as in the case of foreclosure of judgment liens. The amount realized by such enforcement of the lien shall be credited upon the proper personal judgment. The deficiency, if any, remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against any party liable therefor.

(3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

(4) Real property against which a lien under this chapter is enforced may be ordered sold by the court and the proceeds deposited into the registry of the clerk of the court, pending further determination respecting distribution of the proceeds of the sale.

RCW 60.04.221. Notice to lender--Withholding of funds

Any lender providing interim or construction financing where there is not a payment bond of at least fifty percent of the amount of construction financing shall observe the following procedures and the rights and liabilities of the lender and potential lien claimant shall be affected as follows:

(1) Any potential lien claimant who has not received a payment within five days after the date required by their contract, invoice, employee benefit plan agreement, or purchase order may within thirty-five days of the date required for payment of the contract, invoice, employee benefit plan agreement, or purchase order, give a notice as provided in subsections (2) and (3) of this section of the sums due and to become due, for which a potential lien claimant may claim a lien under this chapter.

(2) The notice shall be signed by the potential lien claimant or some person authorized to act on his or her behalf.

(3) The notice shall be given in writing to the lender at the office administering the interim or construction financing, with a copy given to the owner and appropriate prime contractor. The notice shall be given by:

(a) Mailing the notice by certified or registered mail to the lender, owner, and appropriate prime contractor; or

(b) Delivering or serving the notice personally and obtaining evidence of delivery in the form of a receipt or other acknowledgment signed by the lender, owner, and appropriate prime contractor, or an affidavit of service.

(4) The notice shall state in substance and effect as follows:

(a) The person, firm, trustee, or corporation filing the notice is entitled to receive contributions to any type of employee benefit plan or has furnished labor, professional services, materials, or equipment for which a lien is given by this chapter.

(b) The name of the prime contractor, common law agent, or construction agent ordering the same.

(c) A common or street address of the real property being improved or the legal description of the real property.

(d) The name, business address, and telephone number of the lien claimant.

The notice to the lender may contain additional information but shall be in substantially the following form:

NOTICE TO REAL PROPERTY LENDER
(Authorized by RCW

TO:
(Name of Lender)

.....
(Administrative Office-Street Address)

.....
(City) (State) (Zip)
AND TO:
(Owner)

AND TO:
(Prime Contractor-If Different Than Owner)

.....
(Name of Laborer, Professional, Materials, or Equipment Supplier) whose
business address is, did at the property located at

.....
(Check appropriate box) () perform labor () furnish professional services ()
provide materials () supply equipment as follows:

.....
.....
.....
which was ordered by
(Name of Person)

whose address was stated to be

.....
The amount owing to the undersigned according to contract or purchase order
for labor, supplies, or equipment (as above mentioned) is the sum of
..... Dollars (\$.....). Said sums became due and owing as of

.....
(State Date)

.....
You are hereby required to withhold from any future draws on existing
construction financing which has been made on the subject property (to the
extent there remain undisbursed funds) the sum of Dollars
(\$.....).

IMPORTANT

Failure to comply with the requirements of this notice may subject the lender
to a whole or partial compromise of any priority lien interest it may have
pursuant to RCW 60.04.226.

DATE:
By:
Its:

(5) After the receipt of the notice, the lender shall withhold from the next and subsequent
draws the amount claimed to be due as stated in the notice. Alternatively, the lender may obtain

from the prime contractor or borrower a payment bond for the benefit of the potential lien claimant in an amount sufficient to cover the amount stated in the potential lien claimant's notice. The lender shall be obligated to withhold amounts only to the extent that sufficient interim or construction financing funds remain undisbursed as of the date the lender receives the notice.

(6) Sums so withheld shall not be disbursed by the lender, except by the written agreement of the potential lien claimant, owner, and prime contractor in such form as may be prescribed by the lender, or the order of a court of competent jurisdiction.

(7) In the event a lender fails to abide by the provisions of *subsections (4) and (5) of this section, then the mortgage, deed of trust, or other encumbrance securing the lender shall be subordinated to the lien of the potential lien claimant to the extent of the interim or construction financing wrongfully disbursed, but in no event more than the amount stated in the notice plus costs as fixed by the court, including reasonable attorneys' fees.

(8) Any potential lien claimant shall be liable for any loss, cost, or expense, including reasonable attorneys' fees and statutory costs, to a party injured thereby arising out of any unjust, excessive, or premature notice filed under purported authority of this section. "Notice" as used in this subsection does not include notice given by a potential lien claimant of the right to claim liens under this chapter where no actual claim is made.

(9)(a) Any owner of real property subject to a notice to real property lender under this section, or the contractor, subcontractor, lender, or lien claimant who believes the claim that underlies the notice is frivolous and made without reasonable cause, or is clearly excessive may apply by motion to the superior court for the county where the property, or some part thereof is located, for an order commanding the potential lien claimant who issued the notice to the real property lender to appear before the court at a time no earlier than six nor later than fifteen days from the date of service of the application and order on the potential lien claimant, and show cause, if any he or she has, why the notice to real property lender should not be declared void. The motion shall state the grounds upon which relief is asked and shall be supported by the affidavit of the applicant or his or her attorney setting forth a concise statement of the facts upon which the motion is based.

(b) The order shall clearly state that if the potential lien claimant fails to appear at the time and place noted, the notice to lender shall be declared void and that the potential lien claimant issuing the notice shall be ordered to pay the costs requested by the applicant including reasonable attorneys' fees.

(c) The clerk of the court shall assign a cause number to the application and obtain from the applicant a filing fee of thirty-five dollars.

(d) If, following a hearing on the matter, the court determines that the claim upon which the notice to real property lender is based is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order declaring the notice to real property lender void if frivolous and made without reasonable cause, or reducing the amount stated in the notice if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by

the person who issued the notice. If the court determines that the claim underlying the notice to real property lender is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the issuer of the notice to be paid by the applicant.

(e) Proceedings under this subsection shall not affect other rights and remedies available to the parties under this chapter or otherwise.

RCW 60.04.226. Financial encumbrances--Priorities

Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.